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In the Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-160, 78-161

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN,
R.G.P. INCORPORATED, DARRELL L. HAROLD, HAROLD M.
AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON,
TRAVELERS INSURANCE COMPANY, STATE OF IOWA, AND
STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

v.

OMAHA INDIAN TRIBE AND UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

Brief of Title Insurance and Trust Company and Pioneer National Title Insurance Company as Amici Curiae in Support of Petitioners

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Errata

Page ii, line 15 : *aff'd* should be *aff'g*
 Page ii, line 22 : Ritte should be Ritter
 Page iii, line 16 : F.2f should be F.2d

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Pioneer National Title Insurance Company as
Amici Curiae in Support of Petitioners**

STATEMENT OF INTEREST OF AMICI CURIAE¹

Amicus curiae Title Insurance and Trust Company (hereafter referred to as "TI") insures land titles in California,

1. Attorneys for all of the parties in Nos. 78-160 and 78-161 have consented in writing to the filing of this amicus brief. Copies of the consents have been filed with this brief.

Nevada and Hawaii. TI is the largest insurer of land titles in the State of California, and accounts for 9.1% of the title insurance issued in the United States. Amicus curiae Pioneer National Title Insurance Company (hereafter referred to as "PNTI") operates in forty-nine states and insures 9.3% of the land titles in the United States.² TI and PNTI are part of the TICOR group of title insurance companies and collectively represent the largest insurer of land titles in the country.³ Amici have insured numerous properties throughout the country which adjoin Indian reservations. There are well over a hundred reservations which have a navigable river as their common boundary with privately owned property. A map showing these reservations is attached as an appendix to this brief.

By its very nature, the ability of purchasers to obtain title insurance is essential to the success of any transfer of title. Consequently, the ability of amici to insure titles in a reliable fashion based upon stable and predictable rules of law is fundamental to the title insurance business and to the transfer of real property in general.

The decision of the Eighth Circuit is a radical departure from the rule repeatedly announced by this Court that state law governs land title matters. The Court of Appeals improperly carved out an exception to this rule by making

2. Figures for the percentage of title insurance policies issued represent the calendar year 1977. Figures are not available for 1978.

3. TI has no existing or potential monetary interest in the outcome of this litigation. PNTI could have a direct interest in the future if there should be a loss of title by the private parties. Such interest would arise by reason of a reinsurance policy issued by PNTI. Whether or not this potential interest materializes depends on the date of loss and would pertain only to that portion of a loss exceeding \$1,000,000.

federal law applicable to land title disputes involving Indian reservations. The Eighth Circuit concedes that had this conflict involved only private parties and the State of Iowa, state law would have been applied. The choice of federal law led the Court of Appeals to invoke 25 U.S.C. § 194, thereby shifting the burden of proof to the State of Iowa and the private claimants. The Eighth Circuit's reliance on 25 U.S.C. § 194 and its application of federal law reached a result contrary to state law.

Since land title matters have traditionally been governed by state law, federal common law on the subject is incomplete, unpredictable and at times in conflict with state law. For example, many states, including Iowa, presume that the movement of a river is by accretion and erosion unless the contrary is shown. *See, e.g., Kiteridge v. Ritter*, 172 Iowa 55, 151 N.W. 1097 (1915). The Court of Appeal had difficulty determining if there was any federal common law at all on this subject. Thus, the net effect of the Eighth Circuit's decision is to create instability in titles to lands where Indian reservations exist, particularly if a river or stream constitutes the reservation boundary. If the Eighth Circuit is not reversed, thousands of property owners throughout the country, as well as title insurers such as amici, will be left in a state of uncertainty as to the validity of such titles.

The concern of amici is heightened by the potential impact of 25 U.S.C. § 194 on Indian land title claims and disputes. Because these disputes often turn on events which took place many years ago, the burden of proof may well be the decisive factor in resolving questions of title. If the Court of Appeals decision stands, application of federal law and 25 U.S.C. § 194 will place the burden in every instance on the non-Indian party. The result will be the up-

setting of land titles on a scale that has never before occurred.

BRIEF OF AMICI CURIAE

OPINIONS BELOW

The memorandum opinion of the District Court, together with its findings of fact and conclusions of law, is reported at 433 F.Supp. 57, 67 (N.D. Iowa 1977) and the opinion of the Eighth Circuit Court of Appeals is reported at 575 F.2d 620 (8th Cir. 1978).

STATUTE INVOLVED

25 U.S.C. § 194 provides:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding that federal and not state common law with regard to accretion and avulsion is applicable in this case.
2. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries.
3. Whether the Eighth Circuit erroneously construed 25 U.S.C. § 194 to apply to this case.
4. Whether the State of Iowa is "a white person", and the Omaha Indian Tribe is "an Indian" within the meaning of 25 U.S.C. § 194.

Amici direct their comments to two of the issues as to which certiorari was granted:⁴

1. Did the Eighth Circuit err in holding that federal and not state common law is applicable in this case; and
2. Does federal law require divestiture of Iowa's title to real property located within its boundaries.

STATEMENT OF THE CASE

This case concerns the effect of movement of the Missouri River upon the common boundary of the parties. The Missouri River in the Blackbird Bend area is and has been a navigable stream since Iowa was admitted to the Union. Over the years the river has moved radically. At times it has altered its course by sudden (avulsive) changes. At other times, the river's slow and imperceptible meanderings have resulted in accretion to one shore and erosion of the other.

When Iowa was admitted to the Union on December 28, 1846 (5 Stat. 742), the westerly boundary of that state was designated as the center of the main channel of the Missouri River. Eight years later, on March 16, 1854, the Omaha Indian Tribe ceded all of its lands west of the Missouri River to the United States, reserving for their future home a portion of those lands located west of the center of the main channel of the Missouri River in the Territory of Nebraska. (Act of March 16, 1854, Art. 1, 10 Stat. 1043.) The common boundary between the Omaha Indian reservation and the State of Iowa at the time the reservation was created was therefore the center line of the main channel

4. The Court of Appeal's reliance upon federal law led it to invoke 25 U.S.C. § 194 to shift the burden of proof to the non-Indian parties. Amici concur with amicus curiae American Land Title Association that the Eighth Circuit's application of 25 U.S.C. § 194 was erroneous.

of the Missouri River.⁵ The easterly boundary of the Omaha Indian reservation was surveyed in 1867 by T. H. Barrett on behalf of the General Land Office of the United States. In that same year, on March 1, 1867, Nebraska was admitted to the Union and its easterly common boundary with Iowa was designated as the center of the main channel of the Missouri River. (14 Stat. 391.)

In succeeding years, it appears that the Missouri River first moved easterly and thereafter commenced a westward migration until it finally reached its present location. The river is now located substantially west of the 1867 Barrett survey line as well as west of its location as of the dates Iowa and Nebraska were admitted to the Union. Because of the frequent meanderings of the Missouri River and the difficulty in determining whether or not the changes in the river's course were avulsive or accretive, Iowa and Nebraska sought to eliminate continuing disputes over their boundary by entering into a compact in 1943. (Iowa-Nebraska Boundary Compact, Iowa Code 1971, pg. LXIV; 1943 Iowa Acts, ch. 306; 1943 Nebraska Laws, ch. 130. Ratified by Congress by Act of July 12, 1943, 57 Stat. 494.) The compact fixed the two states' common boundary at a location some distance east of the present location of the Missouri River but west of the 1867 Barrett survey line. Since one of the results of fixing the permanent boundary was that some riparian lands formerly located in one state were thereafter located in the other, the compact provided that titles good in the original state were to be recognized as valid. *Nebraska v. Iowa*, 406 U.S. 117, 120 (1972).

5. For the purpose of this brief only, amici have assumed, as did the Court of Appeal, that the eastern boundary of the reservation is the center of the main channel of the river. The private party petitioners dispute the Court of Appeal's assumption in this regard.

The controversy here centers on the movement of the Missouri River, which is the easterly boundary of the Omaha reservation, and whether such movement was the result of gradual and imperceptible accretion and erosion, as asserted by Iowa and the private party claimants, or of the sudden and perceptible process of avulsion, as claimed by the Omaha Tribe and the United States. The District Court refused to apply 25 U.S.C. § 194 and concluded that each side must bear the burden of persuasion as to the facts necessary to establish their claim. *United States v. Wilson*, 433 F.Supp. 57 (N.D. Iowa 1977). The court thereupon determined that the movement of the Missouri had been due to accretion and erosion as contended by the State of Iowa and the private party claimants. 433 F.Supp. 67. The District Court concluded that although federal law fixed the initial boundary of the reservation, state law should be applied to determine the impact of the movement of the Missouri River upon that boundary. Applying state law, the District Court ruled that the boundary of the Omaha reservation had moved westward and that the private parties were entitled to ownership of the area in question since it had accreted to the Iowa side of the river.

The Eighth Circuit reversed, concluding that federal law should be applied not only to the original fixing of the boundary of the Omaha Indian reservation but also to all incidents of ownership that flowed therefrom, including the effect of the movement of the Missouri River. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978). It is the position of amici that the decision of the Eighth Circuit was erroneous and contrary to long-standing rules established by this Court.

SUMMARY OF ARGUMENT

Although federal law governs the construction of grants from the United States in the first instance, the incidents or rights which attach to ownership of such property are to be determined by state law. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378-380 (1977); *Packer v. Bird*, 137 U.S. 661, 669 (1891). The Court of Appeals refused to apply this rule for two reasons: first, the Court assumed that the dispute involved the location of the interstate boundary between Iowa and Nebraska and therefore required application of federal law, and second, the court concluded that a "special relationship" exists between the United States and the Omaha Indian Tribe which compels the application of federal law. Neither conclusion is correct.

The location of the Iowa-Nebraska boundary is not at issue here and has no bearing upon the claims of the parties. None of the parties' property boundaries depend upon the location of that line. Moreover, even if this dispute involved the location of the Iowa-Nebraska boundary, this Court has concluded that, although federal law would apply in resolving the location of the interstate boundary, state law would govern the rights attendant to land either emerging or disappearing on either side of that boundary by reason of movement of the stream which constitutes the boundary. *Arkansas v. Tennessee*, 246 U.S. 158 (1918).

This Court has consistently held that the fact that an Indian reservation or Indian land is the subject of a land title dispute does not call for the application of federal rather than state law. State law governs the incidents of riparian ownership accruing to a federal reservation of Indian tribal lands, as well as federal grants of other lands. *Oklahoma v. Texas*, 258 U.S. 574 (1922).

The Court of Appeals erroneously concluded that recognition of the claims of the State of Iowa and the private owners would somehow "divest" the Omaha Tribe of a portion of its native lands. This error arose from the Court's lack of understanding of the nature of the riparian boundary which constitutes the common boundary between the Omaha Tribe and the other parties to the litigation.

The reservation boundary is the center of the main channel of the Missouri River. Since a riparian boundary is by nature a moving one, the Omaha tribe's ownership of riparian lands carries with it the risk that the acreage will be reduced through erosion. *See Nebraska v. Iowa*, 143 U.S. 359 (1892). Erosion of the boundary of the Omaha reservation does not constitute a divestiture of title; it is simply a consequence of ownership of riparian lands.

Application of federal rather than state law of avulsion and accretion, together with shifting the burden of proof to the non-Indian parties by the application of 25 U.S.C. § 194, results in replacing a reliable and well-understood body of state law with an incomplete and uncertain body of federal law. The Eighth Circuit's decision brings into question the grants of thousands of acres of riparian land adjoining Indian reservations without any legal or equitable rationale for doing so.

STATE LAW GOVERNS LAND TITLE QUESTIONS WHERE TITLE EMANATES ORIGINALLY FROM FEDERAL GRANTS

Application of state law to land title matters is based on the Tenth Amendment to the Constitution. The impact of the Tenth Amendment was discussed by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), where the Court held that except in matters governed by the United States Constitution or by acts of Congress, the law

to be applied in any case is the law of the state, since there is no federal general common law. 304 U.S. at 78. The *Eric* doctrine is applicable to actions brought by the United States or an Indian Tribe under 28 U.S.C. § 1362. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-592 (1973).

This Court has consistently held that although federal law governs the construction of an original grant from the United States, all incidents and rights attaching to such a grant will be determined by state law, as long as the state rule does not impair the efficacy of the federal grant. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 378-380 (1977); *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894); *Hardin v. Jordan*, 140 U.S. 371 (1891); *St. Louis v. Rutz*, 138 U.S. 226 (1891); *Packer v. Bird*, 137 U.S. 661, 669 (1891). This rule was recently and emphatically affirmed in *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, where this Court reconsidered and reversed a contrary rule established in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

Application of state law of accretion here does not impair or destroy the efficacy of the federal reservation of Indian lands in any way. The eastern boundary of the Omaha reservation is described as being the center of a navigable stream. As pointed out by this Court in *Nebraska v. Iowa*, 143 U.S. 359 (1892), such a grant runs to a moving boundary which may change from time to time by accretion or erosion. Thus, movement of the Omaha Tribe's boundary because of the movement of the river does not cause a divestiture of title to land; it is simply one of the incidents of a riparian boundary.

The application of state law to determine the incidents of a federal grant is particularly appropriate where water

boundaries are involved, since the states acquired title to the beds of all navigable waterways by virtue of their sovereignty when they were admitted to the Union. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 374; *Shively v. Bowlby*, *supra*, 152 U.S. at 57-58; *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223-224 (1844). This Court has consistently held that it is within the sole province of each state to determine the rules of property applicable to lands adjacent to navigable waters. *Barney v. Keokuk*, 94 U.S. 324, 338 (1876); *Hardin v. Jordan*, *supra*; *Packer v. Bird*, *supra*.

In its decision below, the Eighth Circuit appears to have overlooked the fact that the State of Iowa obtained title to the bed of the Missouri River by reason of its sovereignty eight years prior to the creation of the Omaha reservation. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 373-375; *Pollard's Lessee v. Hagan*, *supra*, 44 U.S. (3 How.) at 223-224. Therefore, at the time the Omaha reservation was created, Iowa owned that portion of the Missouri River east of the center line of the main stream in its sovereign capacity. The effect of the Eighth Circuit's decision to apply federal law has been to deprive the State of Iowa of its vested rights to sovereign lands acquired prior to the creation of the Omaha reservation. There is no legal or policy justification for such a result.

Since state rather than federal law has traditionally been applied, no well-developed body of federal common law pertaining to land title matters exists. The federal law which does exist is incomplete and applicable only to special situations, such as an action between two states where original jurisdiction is vested in the United States Supreme Court. Therefore, the result of the Eighth Circuit's decision

is to supplant a well-developed and understood body of state law in favor of a nebulous and uncertain body of federal law. It goes without saying that such a result must be predicated upon some overriding rule or policy. As will be discussed *infra*, neither the applicable law nor its underlying rationale support the decision of the Court of Appeals.

**THIS CASE DOES NOT INVOLVE THE LOCATION OF
AN INTERSTATE BOUNDARY**

The Eighth Circuit concluded that federal law should be applied because the dispute purportedly involved the location of the interstate boundary between Iowa and Nebraska. This proposition is clearly incorrect.

The Eighth Circuit rather obliquely recognized the well-established principle that federal law governs the construction of grants from the United States in the first instance, but the incidents or rights which attach to ownership of such property are to be determined thereafter by state law. 575 F.2d at 628. See *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 378-380; *Shively v. Bowlby*, *supra*, 152 U.S. at 57-58; *Hardin v. Jordan*, *supra*; *St. Louis v. Rutz*, *supra*; *Packer v. Bird*, *supra*, 137 U.S. at 669. However, the Court relied upon a limited exception to that general proposition which calls for the application of federal law to disputes involving the location of an interstate boundary. 575 F.2d at 628.

Amici recognize that if a navigable stream constitutes an interstate boundary, federal common law determines the effect of a change in the bed of the stream on that boundary. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 375; *Arkansas v. Tennessee*, 246 U.S. 158 (1918); *Nebraska v. Iowa*, 143 U.S. 359 (1892).

However, the location of the common boundary between Iowa and Nebraska is not involved in the determination of the boundary of the Omaha reservation. The Iowa-Nebraska boundary was fixed by compact in 1943. The location of the boundary of the Omaha reservation is totally independent of the location of the interstate boundary, since it is defined by the center line of the main channel of the Missouri River, not by the Iowa-Nebraska boundary itself. The contrary might be true if the east boundary of the Omaha Indian reservation were described as being the west boundary of Iowa. However, such is not the case.

The interstate border only determines whether Iowa or Nebraska law applies in interpreting the incidents of ownership that arose from the establishment of the reservation. Its location is not at issue, so the interstate boundary exception to the general rule requiring application of state law is not applicable.

Even assuming *arguendo* that this suit does involve an interstate boundary dispute, that fact would still provide no basis for applying federal law. *Arkansas v. Tennessee*, 246 U.S. 158 (1918), involved a dispute between those two states arising out of the movement of the Mississippi River. This Court held that although it had original jurisdiction to resolve such an interstate boundary dispute, the law that is applicable to the rights attendant to land either emerging or disappearing on either side of the interstate boundary by reason of movement of the river is a matter to be determined according to the law of each state. The Court emphasized that it is for the states to establish for themselves such rules of property as they deem expedient with respect to navigable waters within their boundaries and the riparian lands adjacent to them. *Id.* at 175-176.

THE OMAHA TRIBE HAS NOT BEEN DIVESTED OF ITS LANDS

The Eighth Circuit accepted the contention of the United States and the Omaha Tribe that to recognize the claims of the State of Iowa and the private owners was to somehow divest the Omaha Tribe of a portion of its native lands. It appears that the Eighth Circuit refused to apply state law simply to avoid this result. However, the Eighth Circuit's rationale is based upon the faulty premise that application of state law would "divest" the Omaha Tribe of its reservation lands. This error arises from a lack of understanding of the nature of riparian boundaries.

A riparian boundary is by its very nature a moving boundary. *Nebraska v. Iowa*, 143 U.S. 359 (1892). Where a boundary is described with reference to the bank or center of a navigable stream, it must necessarily change when erosion or accretion occurs in order for the riparian character of the land to be maintained.

Recognizing that retaining the riparian character of land bordering navigable water is an essential element of the value of that land, the common law has always held that such a boundary moves with erosion or accretion. *Hughes v. Washington*, 389 U.S. 290, 293-294 (1967); *Nebraska v. Iowa*, 143 U.S. 359 (1892). Any other rule would deprive the riparian owner of what has often been recognized as the essential attribute and most valuable feature of riparian land—access to water. *Hughes v. Washington, supra*. For example, if in this case the Missouri River had moved east rather than west from the line of the Barrett survey and the law provided that riparian boundaries were not subject to change, the Omaha Tribe would be deprived of riparian rights and access to the Missouri River. The reverse is also true. With the westward migration of the Missouri River,

landowners to the east whose boundary extended to the middle of the stream would lose the riparian quality of their land if that boundary were fixed at the Barrett survey line.

To avoid consequences such as this, the law has recognized that riparian boundaries are subject to change due to erosion or accretion. Riparian owners may either gain or lose acreage depending upon the nature of the shift in the stream. In either event, however, their property line extends to the stream, thus preserving very valuable riparian rights. Contrary to the Eighth Circuit's conclusion, the Omaha Tribe was not "divested" of title under the decision of the District Court. Rather, the loss of acreage was an inherent risk of being a riparian owner.

If the United States and Omaha Tribe had wished to guarantee that in no event would the acreage of the reservation be decreased by the movements of the river, it would have been a simple matter to establish a reservation with fixed boundaries. When the reservation was established in 1854, it was common knowledge that rivers in general, and the Missouri River in particular, were prone to migrate through accretion and erosion. The United States and the Omaha Tribe must have recognized that it was more important to provide the Tribe with access to the Missouri River than to guarantee a fixed acreage. Accordingly, the eastern boundary of the reservation was defined as the center of the main channel of the Missouri River. Likewise, upon admission to the Union in 1846, the western boundary of the State of Iowa was described with reference to the center of the main channel of the Missouri River in order to afford landowners within the State access to the Missouri River.

Since a riparian boundary which calls to the center of the channel of a navigable stream is by nature a moving

boundary, movement of that boundary by erosion which diminishes the total acreage of a landowners' property does not "divest" the landowner of ownership. The State of Iowa and private owners were not "divested" of their ownership by the eastward migration of the Missouri River from 1890 to 1912, and the Omaha Tribe has not been "divested" of its ownership by the later westward migration of the river. All parties whose property was bounded by the center of the main channel of the Missouri River acquired their property subject to the possibility that their riparian boundary may move in one direction or the other. That possibility was and is an essential element of the nature of the grant by which they acquired title.

The decision of the Court of Appeals to apply federal law here (together with its use of 25 U.S.C. § 194) in effect gives to the Omaha Tribe the benefit of any accretions to the reservation by the eastward movement of the Missouri at the expense of the State of Iowa and the private owners, but exempts the Tribe from the risk of erosion due to a westward movement of the river. There is no law or policy that justifies such an inequitable result.

**THE FEDERAL GOVERNMENT'S "SPECIAL RELATIONSHIP"
WITH THE INDIAN TRIBE DOES NOT REQUIRE THE
APPLICATION OF FEDERAL COMMON LAW**

In its recent decision in *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, this Court held that the incidents of property ownership under a federal grant are governed by state law, even though construction of the initial grant is governed by federal law. 429 U.S. at 378-380. Absent a compelling federal interest, there is no reason to disturb the *Corvallis* rule.

This Court has already held that state law governs the incidents of riparian ownership accruing to a federal grant

of Indian tribal lands. *Oklahoma v. Texas*, 258 U.S. 574 (1922), involved competing claims to the bed of the Red River, which runs along a portion of Oklahoma-Texas border. The Court made the following statement:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the state in which the land lies. *Where it is disposing of tribal land of Indians under its guardianship, the same rules apply.*" 258 U.S. at 594-595 (emphasis added) (footnotes omitted).

Again, in *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943), this Court observed:

"It is well settled that conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the state where the land lies." 318 U.S. at 209-210.

To the same effect are *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88-89 (1922) (state law of riparian rights applies to grants of Indian tribal lands), and *Francis v. Francis*, 203 U.S. 233, 241-242 (1906) (state rule of property used in determining whether Indians held land reserved under treaty in fee simple). Amici respectfully

submit that the foregoing decisions are dispositive of the choice of law questions considered below.

The decisions of the Courts of Appeal prior to the Eighth Circuit's decision below were in uniform agreement with the foregoing decisions of this Court. *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 147 (8th Cir. 1970) *aff'd* 298 F.Supp. 855 (D. Neb. 1969); *Choctaw and Chickasaw Nations v. Cox*, 251 F.2d 733, 735 (10th Cir. 1958); *Choctaw and Chickasaw Nations v. Seay*, 235 F.2d 30, 35 (10th Cir.), *cert. denied*, 352 U.S. 917 (1956); *Herron v. Choctaw and Chickasaw Nations*, 228 F.2d 830, 832 (10th Cir. 1956); *United States v. Champlin Refining Co.*, 156 F.2d 769, 773 (10th Cir. 1946), *aff'd sub nom. Oklahoma v. United States*, 331 U.S. 788 (1947).

In its decision below, the Eighth Circuit attempted to distinguish the prior decisions of this Court and of the Courts of Appeal on the grounds that those decisions involved conveyances of public land or patent grants of Indian allotment lands and not the boundaries of a tribal reservation as such. 575 F.2d at 629. The decisions of this Court indicate, however, that no such distinction is warranted. Titles to reservation lands, allotment lands and lands acquired by federal grant all derive from one paramount source: the federal government. Reservation lands are treated the same as any other federally patented lands. *See United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 346 (1941) ("[I]ndividual Indian occupancy . . . [is] not to be treated differently from 'the original nomadic tribal occupancy.'"); *Brewer-Elliott Oil & Gas Co. v. United States*, *supra*, 260 U.S. at 87-88 (involving riparian rights of reservation lands of Osage Tribe).

The decisions cited by the Eighth Circuit do not support its decision. *Confederated Salish and Kootenai*

Tribes v. Namen, 380 F.Supp. 452 (D. Mont. 1974), *aff'd* 534 F.2d 1376 (9th Cir.), *cert. denied*, 429 U.S. 929 (1976), involved the riparian rights of the named tribes to the bed and banks of Flathead Lake which was immediately adjacent to their reservation. Since the United States held the bed and banks of Flathead Lake in trust for the Indians, there was no basis for applying state law, so the choice of law question simply did not arise. 380 F.Supp. at 461.

The Eighth Circuit also relied on this Court's decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). That case simply held that the District Court had federal question jurisdiction over a suit by the Oneida Nation for possession of reserved tribal lands because "the complaint asserted a current right to possession conferred by federal law, wholly independent of state law." 414 U.S. at 666. The Oneidas' claim thus involved their right to possession of reservation land in the first instance; it did not involve the incidents of ownership accruing after their right of possession was initially established. This Court recognized that "[o]nce [a] patent issues, the incidents of ownership are, for the most part, matters of local property laws to be vindicated in local courts. . . ." 414 U.S. at 676-677. Unlike the Oneidas, the Omahas' claim involves rights attributable to their ownership of the reservation, not the question of possession in the first instance.

The Eighth Circuit relied on "the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated" in deciding to apply federal law. 575 F.2d at 629. However, there is nothing in the nature of that "special relationship" that supports the application of federal law in this case.

The "special relationship" between the United States and the native Indian tribes was originally conceived to be one

of a guardian to its wards. *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Candelaria*, 271 U.S. 432, 439 (1926). The "guardian-ward" status, although sometimes cited by the courts, is a nineteenth century anachronism. The federal government has singled the Indians out for special treatment on numerous occasions, but the reasons for such special treatment have changed.

In the early days of the country's history, the Indians' special status was considered to preclude the application of any state law within the boundaries of an Indian reservation. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832). However, "[o]ver the years this Court has modified [the Worcester principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . ." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 171 (1973) (quoting *Williams v. Lee*, 358 U.S. 217 (1959)). The modern view adopted by this Court is that special treatment of Indians will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians. . . ." *Morton v. Mancari*, *supra*, 417 U.S. at 555.

The application of federal law to the exclusion of state law is one form of special treatment. It is above all justified to prevent discrimination against Indians. See *United States v. Oklahoma Gas & Electric Co.*, *supra*, 318 U.S. at 211. It is also appropriate to prevent state interference with tribal self-government or internal tribal relations. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Federal law also protects the Indians' right to possession of federally reserved lands and prevents their unlawful cession to or seizure by state governments. See *Oneida Indian Nation v. County of Oneida*, *supra*, 414 U.S. at 677.

None of these reasons calling for the application of federal law are involved in this case. There is no question of interference with tribal self-government or internal tribal relations. It is also undisputed that the Omaha Tribe owns the federally granted reservation lands bounded on the east by the Missouri River. Finally, and perhaps most importantly, there is no question of unequal or discriminatory treatment. The Omaha Tribe will receive the same treatment as all other riparian landowners in the State of Iowa. As this Court observed in *United States v. Oklahoma Gas & Electric Co.*, *supra*:

"The interpretation suggested by the Government [that federal law applies] is not shown to be necessary to the fulfillment of the policy of Congress to protect a less favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State. . . ." 318 U.S. at 211 (emphasis added).

There is therefore no rational basis for the special application of federal law. To the extent that the Eighth Circuit's decision below was based on any "special federal interest" in the Omaha Tribe, it is clearly erroneous.

CONCLUSION

It has long been accepted that state law applies to land title matters including the incidents of riparian ownership deriving from federal grants. Millions of acres of land have been bought and sold on this basis. This Court has often stated that where rules of property are at stake, stability and consistency require that they be changed only in rare situations. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, *supra*, 429 U.S. at 381.

The Eighth Circuit has now chosen to carve out an exception to this well-established legal principle underlying the system of land titles in this country. The effect of requiring application of federal law to claims involving Indian reservations is to superimpose a second body of incomplete and often inconsistent laws over a well-established and well-understood system. No justification exists for a rule which would apply federal law to the interpretation of the riparian boundary of an Indian reservation where an identical grant of adjoining property conveyed to a private party would be construed in accordance with state law. This is not one of those rare situations in which extraordinary circumstances require that a rule of property which has been extensively relied upon should be changed. The Eighth Circuit's decision below is erroneous and should be reversed.

Respectfully submitted,

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